Supreme Court, U.S.
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(1)

No.

IN THE
SUPREME COURT OF THE UNITED STATES

ELAINE SPENCER MARR, Pro Se
and ELLIOTT PAUL MOORE, Pro Se,
Petitioners,

v.

LARRY H. HUGHES, TOMMIE R. HUGHES,
and THE STATE OF COLORADO DEPARTMENT OF
TRANSPORTATION,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the Chaffee County, Colorado District Court had authority to hear and issue rulings such as **FINDINGS AND VERDICT ON TRIAL TO COURT** court order (see Appendix H) which ORDER essentially overrules Petitioners' Chaffee County, Colorado District Court Quiet Title Court Order of November 22, 1982 entitled "**Amended Decree**" (see Appendix I), without following the mandates of Colorado Revised Statute Title 38 PROPERTY-REAL AND PERSONAL- EMINENT DOMAIN.

2. Whether Res Judicata, sometimes referred to as Claim Preclusion, is an absolute bar to relitigation of this Colorado civil case which involves the denial of Petitioners' constitutional right of due process that could have been raised and argued at the Chaffee County District Court trial of their case, but was not. Decisions of United States Courts of Appeal are in conflict on the same important matter.

3. Whether a "plain error" exception to res judicata that is (a) error, (b) clear and obvious at the time of the appeal, (c) that affects the Appellants' substantial rights, and, (d) affects the integrity, fairness, or public reputation of judicial proceedings should, in the interests of justice, be allowed.

BRIEF SUMMARY OF THE CASE

Petitioners since 1971 have owned and used an easement that accessed U.S. Highway 50 in Colorado, title secured by court order (TE2, Appendix I). Respondents Hughes and The Colorado Department of Transportation, without consent of or prior notice to Petitioners, took, moved and damaged the easement and highway access. Chaffee County District Court denied return of the easement to Petitioners. No objections were reserved. Subsequent federal courts have all asserted Res Judicata thereby denying Petitioners' attempts to get redress and their easement and its highway access returned to them.

(Petitioners' note re the following: symbol "(T)" refers to the Trial Transcript, any numbers that follow refer to the transcript page; The symbol "(TE)" refers to Petitioners' Trial Exhibits, the numbers that follow refer to the number of the exhibit).

LIST OF THE PARTIES

The parties below are as listed in the caption.

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APPENDIX B.. Page 31 — **THE UNITED STATES COURT** OF APPEALS FOR THE TENTH CIRCUIT, Case No. 08-1378 (D.C.. No. 1:07-CV-01746-WYD-KMT) (D.Colo.) Before KELLY, McKAY and BRISCOE, Circuit Judges, dated June 11, 2009. **ORDER** ".. Having reviewed the briefs, the record, and the reversible error in this case. We therefore **AFFIRM** the judgment of the district court for substantially the same reasons set forth in the magistrate judge's recommendation and in the district court's order accepting and affirming the magistrate judge's recommendation."

APPENDIX C. Page 35 — **THE UNITED STATES** DISTRICT COURT FOR THE DISTRICT OF COLORADO,

Civil Action No. 07-cv-01746-WYD-KMT, JUDGE WILEY Y. DANIEL, dated September 17, 2008. **ORDERED** "that plaintiffs complaint and action are dismissed with prejudice".

APPENDIX D. Page 37 — **UNITED STATES DISTRICT** COURT FOR THE STATE OF COLORADO. ORDER ACCEPTING AND AFFIRMING RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE, KATHLEEN M. TAFOYA, Civil Action No. 07-cv-01746-WYD-KMT, dated September 16, 2008 that "Plaintiffs' Petition for Redress is barred by the principles of claim preclusion and res judicata".

APPENDIX E. Page 42 — **SUPREME COURT, STATE OF** Colorado, CASE NO. 06SC613, "Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,
IT IS THIS DAY **ORDERED** that said Petition for Writ of Certiorari shall be, and the same hereby is

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APPENDIX F. Page 43 — **COLORADO COURT OF** APPEALS No. 06CA1080, Tr. CT. No. 04CV79, dated August 16, 2006. **holding** that "... the petition for writ of certiorari, which was transferred to this Court by the supreme court and which this Court accepts as the notice of appeal, filed on May 23, 2006, was not timely".

APPENDIX G. Page 45 — **THE SUPREME COURT,** STATE OF COLORADO, "No case# (sic.))assigned," dated May 26, 2006. **ORDER** OF COURT "Upon consideration of the Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises, **IT IS ORDERED** that said case is transferred to the (Colorado) Court of Appeals pursuant Sec. 13-4-110(3), C.R.S. (2005)", BY THE COURT".

APPENDIX H. Page 46 — **DISTRICT COURT, CHAFFEE** COUNTY, COLORADO, Case No. 04CV79, **FINDINGS AND VERDICT** ON TRIAL TO COURT

dated September 14, 2005.

"The court understands Ms. Marr's position. Her legal right to rely upon the express terms of the easement were willfully trampled upon by Mr. Hughes. Nonetheless, there are no actual damages to the easement in that it is no less valuable now that (sic.) it was previously. Ms. Marr may, under the terms of this order, still exercise the same enjoyment on the new easement as she did on the original. Therefore actual damages must be nominal, i.e., one dollar.

"Exemplary damages for interference and alteration of the easement are appropriate given the court's findings above. The court finds that plaintiffs have established by proof beyond a reasonable doubt that Mr. Hughes' conduct was willful. The court is limited to an award of $1 for exemplary damages under Sec. 13-21-102(1)(a), C.R.S.... The facts do not support any increase in exemplary damages under Sec. 13-21-102(1)(a), C.R.S."

"The damages for trespass upon Tract 3 are for repair of fence and replacement of the culvert. They total $300. The court does not find that Mr. Hughes' conduct was willful in the trespass upon Tract 3. The actions of the contractors were not shown to be at his direction and the trespass was remedied when brought to his attention. Therefore, no exemplary damages are awarded in addition to the $300.."

"There is no evidence that CDOT acted contrary to statute or regulation and therefore no proof that it failed to do a duty it is obligated to do or did an act it was not lawfully permitted to do."

"THEREFORE, IT IS THE VERDICT AND JUDGMENT OF THE COURT THAT:

"First Claim For Relief: Defendant Hughes shall execute, deliver to Plaintiffs, and record a grant of an easement for Tract 3 for ingress and egress of 14 feet in width which conforms to the eastern drivable portion of the Hughes property. This shall be completed

within 30 days of this order. Actual nominal damages of $1 are awarded to Plaintiffs from Defendants Hughes.

Second Claim for Relief: Defendants Hughes are permanently enjoined from any acts hereafter which cause impairment, interference, or damage the easement to Tract 3."

"Third Claim for Relief: Defendants Hughes shall pay damages of $300 to plaintiffs for trespass to Tract 3."

"Fourth Claim for Relief: Plaintiffs' request for declaratory relief is denied."

"Fifth Claim for Relief: Plaintiffs' request for injunctive relief against CDOT is denied."

"Sixth Claim for Relief: The status of the easement of Tract 3 shall be consistent with this verdict and order with the same rights and obligations as prior to its modification except as to location."

"Seventh Claim for Relief: Exemplary damages of $1 are

awarded to plaintiffs.

APPENDIX I: Page 56

DISTRICT COURT, COUNTY OF CHAFFEE, STATE OF COLORADO AMENDED DECREE. "It is ADJUDGED AND DECREED that Elaine Spencer Marr...at the time of commencement of this proceeding, is and she now is the owner in fee simple, with right to possession, of the following real property in Chaffee County, Colorado ... Tract 3 ... together with the right of ingress and egress over a roadway easement 14 feet in width the east line of said easement being described as follows: Beginning at the southeast corner of the above described tract thence south 0°18' West 326.4 feet to the northerly right-of-way boundary of U.S. Highway No 50." Dated November 22, 1982 BY THE COURT /s/ O. Edward Schlatter, District Judge.

OPINION BELOW

"The United States Court of Appeals for the Tenth Circuit.
No.08-1378(D.C. No. 1:07-CV-01746-WYD-KMT) (D. Colo.) **ORDER AND JUDGMENT**. Before **KELLY, McKAY,** AND **BRISCOE,** Circuit Judges".

> "Elaine Spencer Marr and Elliott Paul Moore appeal the dismissal of their 'Petition for Redress' as barred by the principles of claim preclusion and res judicata. Our jurisdiction arises under 28 U.S.C. Sec. 1291, and we affirm."

Mary Beck Briscoe, Circuit Judge Entered for the Court their June 11, 2009 ORDER AND JUDGMENT affirming the judgment of the district court (Appellants' petition for rehearing of this case was denied on July 6, 2009) (See Petitioners' Appendix B) stated as follows:

> "We review de novo the district court's dismissal of Marr and Moore's case. *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005). ("The application of res judicata is a question of law which we review de novo." (citing *Satsky v. Paramount Commc'ns Inc.*, 7 F.3d 1464, 1467-68 (10th Cir. 1993).
>
> " The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by a full faith and credit statute 28

> U.S.C. Sec. 1738, which directs a federal court to refer to the preclusion law of the State in which the judgment was rendered." *Marrese* v. *v. Am. Acad. of Orthopaedic Surgeons*,470 U.S. 373, 380, 105 S.Ct. 1327, 84 L Ed.2d 274 (1985).
>
> "*Brady v. UBS Fin. Servs..*,538 F. 3rd 1319, 1327, (10th Cir. 2008). Colorado rendered the judgment that the federal district court considered in dismissing Marr and Moore's case: We therefore apply the res judicata rules of Colorado". *Id.*"

(Petitioners' note: The Brady case cited above is not a Colorado case. It is an "APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (D.C. NO. CV-06-282-CVE-PJC). "and as such, in Petitioners' opinion, it is not authority for the res judicata rules of Colorado to which full faith and credit need be given).

> "In Colorado, claim preclusion, or res judicata, 'bars relitigation of claims or issues which were or could have been raised in a prior suit between the same parties.' *Rantz v. Kaufman*, 109 P. 3rd 138 (Colo. 2005) (quotation omitted). Indeed it is an absolute bar to relitigation ... when, in both prior and subsequent suits, there is an identity of subject matter, identity of cause of action, identity of parties to the action, and identity of capacity in the persons against whom the claim is made." *Upper Eagle Reg'l Water*

Auth. v. Simpson, 167 P. 3rd 729, 736 (Colo. 2007)."

"Having reviewed the briefs, the record, and the applicable laws pursuant to the above-mentioned standards, we hold that Marr and Moore have failed to identify any reversible error in this case. We therefor AFFIRM the judgment of the district court for substantially the same reasons set forth in the magistrate judge's recommendation in the district court's order accepting and affirming the magistrate judge's recommendation.

"Entered for the Court Mary Beck Briscoe, Circuit Judge."

STATEMENT OF JURISDICTION

THE CONSTITUTION OF THE UNITED STATES
ARTICLE III

The Judicial Department

"**Sec 2. Jurisdiction. (1)** The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, ..."

> "(2) **Jurisdiction of supreme court.** ... the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make".

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on July 6, 2009. The Petition for Writ of Certiorari was filed on Friday October 2, 2009. The Petition for Writ of Certiorari was placed by Petitioners in the United States mail, certified, Return Receipt Requested, with sufficient first class postage attached thereto on Friday, October 2, 2009. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE CONSTITUTION OF THE UNITED STATES

ARTICLE III

The Judicial Department

> "**Sec. (2). Jurisdiction of supreme court.** In all cases ... in which a state shall be a party , the supreme court shall have original jurisdiction. In all other cases before mentioned the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations, as the congress shall make."

ARTICLE VI

Miscellaneous Provisions

"(2) **Supremacy of the constitution, treaties and laws.** This constitution and the laws of the United States which shall be made pursuant thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary not withstanding.

"(3) **"Oath to Support constitution....** all executive and judicial officers, both of the United States and of the several states, shall be bound by oath and affirmation to support this constitution;..."

AMENDMENT V

"**... process of law -taking property for public use.** No person shall be ... deprived of ... property without due process of law nor shall private property be taken for public use without just compensation".

AMENDMENT XIV

"**Sec 1. ... - privileges of citizens.** ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of property without due process of

law, nor deny to any person within its jurisdiction the equal protection of the laws".

UNITED STATES CODE ANNOTATED

TITLE 42

"SEC. 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute ... custom or usage, of any state ... subjects or causes to be subjected any citizen of the United States ... to the deprivation of any rights ... secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ..."

CONSTITUTION OF THE STATE OF COLORADO

Article II Bill of Rights

Section 14. Taking private property for private use. Private property shall not be taken for private use **unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes".** (emphasis Petitioners')

"**Section 15. Taking property for public use compensation, how ascertained...** Private property shall not be taken or damaged for public or private use without just compensation. Such compensation shall be ascertained by a board of commissioners of not less than three freeholders, or by a jury when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed or the proprietary rights of the owner therein divested...."

"**Both Sec. 15 of Art. II Colo. Constitution, and this section (C.R.S. 38-1-101) protect** an individual's vested rights and prohibit the taking thereof for public or private use without condemnation proceedings and just compensation given therefor."

Stuart v. County Comm'rs,
25 Colo. App. 568, 139 P. 577 (1914).

"**Right of just compensation** guarded. Section 15 of Article II Colorado Constitution guarantees just compensation to the owner when property is taken without consent, and this right is jealously guarded."

Lamborn v. Bell, 18 Colo. 346,
32 P. 989, 20 L.R.A. 241 (1893).

Section 25. Due Process of Law. No person

shall be deprived of life, liberty or property, without due process of law.

COLORADO REVISED STATUTES Title 38

PROPERTY-REAL AND PERSONAL-EMINENT DOMAIN

"**C.R.S. 38-1-101. Compensation - commission-jury ...**
(1) Private property shall not be taken or damaged for public or private use without just compensation...
(2) compensation shall be ascertained by a board of commissioners of not less than three disinterested and impartial freeholders pursuant to section 38-1-105... All questions and issues **except amount of compensation** shall be determined by the court ...". (Emphasis Petitioners).

"**State has duty to assure just compensation**. It is the duty of the state in the conduct of an inquest by which compensation is ascertained, to see that it is just not merely to the individual whose property is taken, but to the public which is to pay for it."
Williams v. City and County of Denver, 147 Colo. 195, 363 P.2d 171 (1961)

"**38-1-103 Summons**... A summons shall be issued and served and proof of service shall be made in accordance with the Colorado rules of

civil procedure."

"**38-1-105. Adjournment-compensation - defective title - withdrawal of deposit.** (1) The court may adjourn the proceedings from time to time and shall direct any further notice thereof to be given that may seem proper. The court shall hear proofs and allegations of all parties touching the regularity of the proceedings and shall rule on all objections thereto... (c) The petitioner shall not take possession of the property sought to be taken or condemned earlier than 30 days after service of summons upon the defendant unless the owner consents to such possession prior to the expiration of the thirty-day period".

"**38-1-122. ATTORNEY FEES.** (1) If the court finds that a petitioner is not authorized by law to acquire real property in a condemnation proceeding it shall award reasonable attorney fees, in addition to any other costs assessed to the property owner who participated in the proceedings.

ANNOTATION

"II. JURISDICTION AND PROCEDURE IN CONDEMNATION.

A. 38-1-101 In General

"**proceedings conducted strictly according to procedures in statute.** Eminent domain proceedings are special statutory proceedings and are to be conducted strictly according to the procedures set out in the eminent domain statute."

Board of Comm'rs v. Poundstone, 74 Colo. 191, 220 P. 234 (1923).

"**Duties of the court, in absence of jury, include** appointing the commissioners, administering the oath of office to them, fixing the time and place of their first meeting, instructing them in writing as to their duties, and at the conclusion of the testimony instructing them in writing as to the applicable and proper law to be followed by them in arriving at their ascertainment ...Court shall upon request make rulings upon propriety of proofs and objections of the parties ... Judge not to preside as in jury trial. The judge of the trial court shall not preside over the commission proceedings in the same manner as he is required to do in a jury trial.

Board of County Comm'rs v. Vail Assocs. 171 Colo. 381, 468 P.2d 842 (1970)

"A federal district court with diversity jurisdiction can consider an inverse condemnation claim arising under the Colorado constitution and statutes providing a special judicial procedure for condemnation claims.

SK Fin. SA v. La Plata County, Bd of Comm'rs
126 F. 3rd 1272 (10th Cir.1997).

STATE OF COLORADO CRIMINAL CODE

Offenses Against Property

"**C.R.S. 18-4-401 theft**. A person commits theft when he knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception".

"**C.R.S. 18-4-405.** Rights in stolen property. All rights in stolen property obtained by theft ... shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his right to such property".

ANNOTATION

1. General consideration.

"Thing of value is defined to include "real property".

People v. Parga 188 Colo. 413, 535P.2nd 1127 (1975).

"Real property may be the subject of a theft."

People v. Parga 188 Colo. 413, 535 P.2nd 1127 (1975).

"C.R.S. 18-5-03. Perjury in the second degree. (1) A person commits perjury in the second degree if, other than in an official proceeding, with an intent to mislead a public servant in the performance of his duty, he makes a materially false statement, which he does not believe to be true, under oath required or authorized by law. (2) Perjury in the second degree is a class 1 misdemeanor."

18-1.3-501. Misdemeanors classified - penalties.

"Class 1 minimum sentence Six months imprisonment or five hundred fifty dollars fine or both.

"Class 1 Maximum Sentence Eighteen months imprisonment, or five thousand dollar fine, or both. "

STATEMENT OF THE CASE

This case concerns Petitioner's farm property (Tract 3) purchased in 1971 (TE1) together with its access

easement to U.S. Highway 50. Petitioner Marr's title was confirmed in 1982 by a Chaffee County District Court Order (TE2, Appendix I). This farm and highway access have been used since 1938 when Petitioners' predecessor in title conveyed some of her land to the state highway department for the highway. See Book 230 Page 279 of the Chaffee County, Colo. records.

Respondent Hughes, for 40 years a real estate broker, and the Colorado Department of Transportation (CDOT) **(1) took** (T34), **(2) damaged**, (T34) and **(3) closed** (T30) Petitioners' easement and highway access **(4) without Petitioners' consent** (T53) **or (5) Petitioners' knowledge** (T21), and **(6)** without initiating a C.R.S.Title 38 condemnation lawsuit, **in violation of (7) the United States and** (8) **Colorado Constitutions,** as well as the **(9) Colorado District Court Order** that confirmed Petitioners' title (TE2, Appendix I), **(10) Colorado's Criminal Code C.R.S. 18 4-401. Theft**, (i.e. taking anothers' property without their consent), and **(11)** C.R.S. 18 -8-503 **Perjury in the second degree**. Perjury is relevant because Respondent Hughes falsely signed CDOT's Access Applications and the issued Highway Access Permit swearing (TE5 and TE8) that he was authorized to represent the interests of Petitioners (under penalty of perjury in the second degree), to wit:

> "The applicant declares under penalty of perjury in the second degree and any other applicable state or federal laws, that all information

> provided on this form and submitted attachments are to the best of their knowledge true and complete....**This signature shall constitute agreement with this application by all owners-of-interest unless stated in writing**".(TE5) and (TE8).

At the trial Respondent Hughes, a long time broker, admitted that he knew Petitioner Marr and how to contact her. But he did not (T16 and T21). The CDOT testified that it was not their business to notify Petitioners, so they did not. (T220)

When Petitioners received no help from the Chaffee County, Colorado District Attorney they hired a recommended Denver attorney and initiated a law suit (litigation expenses 4/16/03-8/17/07 $51,089.07).

Prior to and at the ensuing trial and afterward no one at any time mentioned constitutional rights, due process, petitioners' rights, condemnation statutes, theft, not during the trial, not during the mandated mediation overseen by a retired Judge, not even later at the Colorado Supreme Court. And, of course, no one saved an objection.

Petitioners serendipitously read and found out about C.R.S. Title 38 when a Colorado friend with whom they share a ditch sent them a retired 2003 set of the Colorado Revised Statutes that contained the statutes that concern ditches: C.R.S. Title 37. Title 38 followed Title 37 and that is when Petitioners read and found out about Title 38 and took their case to the Colorado

Supreme Court on a Writ of Certiorari to them. That Court sent Petitioners' case to the Colorado Court of Appeals who dismissed it as "untimely," and the Colorado Supreme Court thereafter affirmed.

All the tribunals Petitioners have petitioned, pro se, since then to try and recover their easement and access have said either that their Appeal (it was actually a pro se Writ of Certiorari to the Colorado Supreme Court) was "untimely," or the issues they have raised are res judicata (i.e., the case has been decided), no exceptions allowed.

Petitioners want and need their easement and their Highway 50 Access returned to them. How are they to get it back if not from this tribunal? By what right was it ever taken from them?

REASONS FOR ALLOWANCE OF THE WRIT

PETITIONERS' ARGUMENTS

THE THREE ISSUES REQUIRED FOR A PLAIN ERROR EXCEPTION TO RES JUDICATA

ISSUE 1. Whether the Chaffee County, Colorado District Court had authority to hear and issue rulings such as **FINDINGS AND VERDICT ON TRIAL TO COURT** court order (see Appendix H) which ORDER essentially overrules Petitioners' Chaffee County,

Colorado District Court Quiet Title Court Order of November 22, 1982 entitled "**Amended Decree**" (see Appendix I), without following the mandates of Colorado Revised Statute Title 38 PROPERTY-REAL AND PERSONAL- EMINENT DOMAIN

COLORADO REVISED STATUTES Title 38

PROPERTY-REAL AND PERSONAL-EMINENT DOMAIN

" C.R.S. 38-1-101. Compensation - commission -jury ...
(1) Private property shall not be taken or damaged for public or private use without just compensation"...
(2) compensation shall be ascertained by a board of commissioners of not less than three disinterested and impartial freeholders pursuant to section 38-1-105... All questions and issues **except amount of compensation** shall be determined by the court ...". (Emphasis Petitioners). "

"**38-1 -103 Summons**... A summons shall be issued and served and proof of service shall be made in accordance with the Colorado rules of civil procedure."

"**38-1-105. Adjournment-compensation - defective title - withdrawal of deposit**. (1) The court may adjourn the proceedings

fromtime to time and shall direct any further notice thereof to be given that may seem proper. **The court shall hear proofs and allegations of all parties touching the regularity of the proceedings and shall rule on all objections thereto...** (c) The petitioner shall not take possession of the property sought to be taken or condemned earlier than 30 days after service of summons upon the defendant unless the owner consents to such possession prior to the expiration of the thirty - day period".

"38-1-122. **ATTORNEY FEES. (1)** If the court finds that a petitioner is not authorized by law to acquire real property in a condemnation proceeding it shall award reasonable attorney fees, in addition to any other costs assessed to the property owner who participated in the proceedings.

CONSTITUTION OF THE STATE OF COLORADO

Article II Bill of Rights

"**Section 14.** Taking private property for private use. Private property shall not be taken for private use unless by consent of the owner, **except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes".**

"**The majority rule in the United States prohibits burdoned estate owners from unilaterally relocating easements.**" Note, The Right of Owners of Servient Estates to Relocate Easements Unilaterally, *109 Harv. L. Rev.* 1693, 1 693 [1233] (1996). " In the majority of jurisdictions in the United States neither the owner of the dominant estate nor the owner of the servient estate may unilaterally relocate an easement once it has been fixed.'); see also 28A C.J.S. Easements Sec. 157 (1996). ('As a general rule, in the absence of contrary statutes, the location of an easement when once established cannot be changed by either party without the other's consent.'). The traditional rule emerged out of the notion of reciprocity; since the benefitted estate owner could not unilaterally move the easement, neither could the burdened estate owner. See *Restatement (Third) Of Property (Servitudes)* Sec. 4.8 cmt. f (2000)." *Roaring Fork Club, L.P. v. St. Jude's Co.* 36 P. 3rd 1229; (2001) **Colo.** LEXIS 954".

COLORADO REVISED STATUTES

ANNOTATION

"JURISDICTION AND PROCEDURE IN CONDEMNATION.

A. 38-1-101 In General

"Duties of the court, in absence of jury, include appointing the commissioners, administering the oath of office to them, fixing the time and place of their first meeting, instructing them in writing as to their duties, and at the conclusion of the testimony instructing them in writing as to the applicable and proper law to be followed by them in arriving at their ascertainment ...Court shall upon request make rulings upon propriety of proofs and objections of the parties ... Judge not to preside as in jury trial. The judge of the trial court shall not preside over the commission proceedings in the same manner as he is required to do in a jury trial.

Board of County Comm'rs v. Vail Assocs. 171 Colo. 381, 468 P.2d 842 (1970)

"proceedings conducted strictly according to procedures in statute. Eminent domain proceedings are special statutory proceedings and are to be conducted strictly according to the procedures set out in the eminent domain statute."

Board of Comm'rs v. Poundstone, 74 Colo. 191, 220 P. 234 (1923).

"A federal district court with diversity jurisdiction can consider an inverse condemnation claim arising under the Colorado constitution and statutes providing a special judicial procedure for condemnation claims.

SK Fin. SA v. La Plata County, Bd of Comm'rs
126 F. 3rd 1272 (10th Cir. 1997.)

PETITIONERS' CONCLUSION ISSUE 1

ISSUE (1). Petitioners are persuaded that both the United States and Colorado constitutions, the Colorado statutes and case law support the position that the only way the Chaffee County District Court could have authority or jurisdiction to hear, try and rule on a case in Colorado that involves a taking of another's property without the owners' permission or consent was to strictly follow C.R.S. Title 38. Petitioners found no authority supporting the Chaffee County District Court's conduct of the trial or the Court's ruling (see Appendix H) overruling Judge Schlatters' Amended Decree (Appendix I).

No evidence has been presented in this case showing that anyone concerned was familiar either with the constitutions, Colorado's Title 38 or their relevance.

PETITIONERS' ARGUMENT
QUESTIONS PRESENTED ISSUE 2

Issue (2). Whether Res Judicata, sometimes referred to as Claim Preclusion, is an absolute bar in Colorado to relitigation of this Colorado civil case which involves the denial of Petitioners' constitutional right of due process that could have been raised and argued at the Chaffee County District Court trial of their case, but was not. Decisions of other United States Courts of

Appeal are in conflict on the same important matter.

The United States Court of Appeals for the Tenth Circuit, Mary Beck Briscoe, Circuit Judge entered for the Court their June 11, 2009 ORDER AND JUDGMENT affirming the judgment of the U.S. District court. Appellants' petition for rehearing of this case was denied on July 6, 2009 (See Petitioners' Appendix B).

Petitioners refer this Court to the August 9, 2005 Colorado case of *Euclides Morales-Fernandez v. Immigration and Naturalization Service*, United States Court of Appeals, Tenth Circuit No. 03-1111 (August 9, 2005) and the persuasive argument put forth therein by 10th CIRCUIT JUDGE SEYMOUR:

> "This court has adopted a firm waiver rule under which a party who fails to make a timely objection to the magistrate judge's findings and recommendations waives appellate review of both factual and legal questions. States. See *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991) This rule does not apply, however, when (1) a pro se litigant has not been informed of the time period for objecting and the consequences for failing to object, or when (2) the 'interests of justice' require review. *Id.; Wirsching v. Colorado*, 360 F. 3rd 1191, 1197 (10th Cir. 2004); "Because the rule is a non jurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice. "

"... Interests of justice is a rather elusive concept. We have, however enumerated several factors this court has considered in determining whether to invoke the exception".

"The notion that the plain error and interests of justice analyses are similar is supported by Supreme Court and Tenth Circuit case law. Both the Court and this circuit have frequently described the Fed. R. Crim. P. 52 (b) plain error standard as shorthand for or synonymous with an "interests of justice," "miscarriage of justice," or "manifest injustice" exception to a litigant's failure to object in the trial court. See, e.g., *United States v. Olano*, 507 U.S. 725, 736 (1993). The discretion conferred by Rule 52(b) should be employed only in those circumstances in which a miscarriage of justice would otherwise result."... "At a minimum, then, our 'interests of justice' standard for determining whether we should excuse a defendant's failure to object to a magistrate judge's recommendation includes plain error".

PETITIONERS' CONCLUSION
ISSUE 2

(1) Petitioners were not informed of the time period for objecting or the consequences of failing to object.

(2) Petitioners urge the Court to correct the error if they find in this case the following:

"If a plain error affects the integrity, fairness, or public reputation of judicial proceedings, it is in the discretion of the reviewing court to correct the error. *Johnson*, 520 U.S. at 467".

PETITIONERS' ARGUMENT
ISSUE 3

ISSUE (3). Whether a "plain error" exception to res judicata that is **(A)** error, **(B)** clear and obvious at the time of the appeal, **(C)** that affects the Appellants' substantial rights, and, **(D)** affects the integrity, fairness, or public reputation of judicial proceedings should, in the interests of justice, be allowed.

Applying to Petitioners' case the above standards enumerated by Judge Seymour for plain error exception to Res Judicata and/or claim preclusion:

A(1). There was error. The error here was Respondents Hughes and the Colorado Department of Transportation's taking and damaging Petitioners' property, their easement, without Petitioners' knowledge or consent, in violation of the United States and State of Colorado Constitutions.

A(2). It was error for the Chaffee County District Court not to follow the mandates of C.R.S. 38-1-102 . "Petition - Contents - Parties. "(1) In all cases where the right to take private property for public or private use without the owner's consent ... it is lawful for the party authorized to take or damage the property to apply to the judge of the district where

the property ...is situate by filing with the clerk a petition setting forth by reference his authority in the premises, the purpose for which said property is sought to be taken or damaged, a description of the property, the names of all persons interested as owners ... and praying such judge to cause compensation to be paid to the owner to be assessed..."

A(3). It was error for Respondents and the Court not to follow the procedural mandates of C.R.S. 38-1-103. summons - return - Publication. (1) A summons shall be issued and served and proof of service shall be made in accordance with the Colorado Rules of Civil Procedure..."

B(1). Plain. The error was plain and obvious to the Court, Petitioners, Respondents' and all officers of the court prior to and at the time of trial because the absence of notice to Petitioners and Petitioners' lack of consent prior to the taking and damaging of their property was part of the sworn trial testimony of both Petitioners and Respondents. (T21).

C(1). The error substantially adversely affected Petitioners and their property, their ability to use that property, and the rights to which they were entitled under the constitutions and C.R.S. Title 38, and their quiet title court decree, to wit:

C(2). Petitioners were never given an opportunity to negotiate with Respondents about a solution to Respondents Hughes' Access problem that might have benefitted all parties.

C(3). Petitioners were denied the opportunity to challenge whether the Defendants' taking Petitioners' easement without their consent came within one of the permitted exceptions spelled out in the Constitution of Colorado, Article II Section 14. In fact Petitioners do not think it did. Respondents' taking was not for a private way of necessity, was not for a reservoir, or for drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes. These are the **only** exceptions the Colorado Constitution Section 14 allows.

C(4). Petitioners were never compensated for the taking of their easement as required by C.R.S. Title 38 and the Colorado and United States Constitutions. Petitioners were awarded by the Chaffee County court judge "actual nominal damages" of $1 from defendants Hughes, $300 for trespass to Tract 3, $1 exemplary damages because "the court finds that Plaintiffs have established beyond a reasonable doubt that Mr. Hughes' conduct was willful." and the court denied return of Petitioners' easement to Petitioners.

C(5). Petitioners were unable to assert that Defendants Hughes had alternatives to the access that Respondents' agent and the CDOT privately together agreed upon and was later in fact constructed.

C(6). Petitioners would have liked to have had a timely opportunity to have installed utility lines to U.S. Highway 50 when the construction area was open and available.

C(7). Petitioners were denied the opportunity to have a 40 foot Access to U.S. Highway 50 at the end of their easement for use by both Petitioners and Hughes which the CDOT testified at trial was the CDOT's preferred location (TE 7). "You may locate the opening at any location along the property line ... provided it does not interefer (sic.) the rights given to the adjacent propery owner by (sic.) the fourteen foot easement." (TE 7)

C(8). Petitioners' vehicles now must negotiate two (2) close right angle turns to access U.S. Highway 50. This makes it very difficult if not impossible to get heavy farm equipment such as back hoes, earth moving equipment, large tractors etc. onto their property for their own use or for rental storage income which they have done for themselves and others in the past.

C(9). Petitioners were unable to point out to Respondents that the pole they believed to be within Petitioners' easement which the Respondents cited at trial as the reason for not putting the new access at the mouth of Petitioners' easement was in fact within the U.S. Highway 50 right-of-way and not within Petitioners' easement. See (TE27) The pole's installation and extraction are solely subject to the control of the CDOT. Before the Respondents' "improvements" to the easement Petitioners' access was a not clearly demarked dirt road to the highway. Everyone including Hughes just drove past the pole. The CDOT can and should move their pole and not punish Petitioners for its installation or presence.

C(10). The effort to try and achieve fairness including the return to Petitioners of Petitioners' easement has been extremely expensive, time consuming, and so far futile.

> "Other circuits have adopted a similarly flexible approach. See *United States v. Brown,* 79 F.3d 1499, 1504 (7th Cir. 1996)....We note that the Sixth Circuit has considered the importance of the issues raised as one factor in applying the interests of justice exception. See *Kent*, 821 F.2d at 1223 (noting that an appeal concerned 'questions of considerable import' in proceeding to the merits despite the appellant's failure to object to the magistrate's report). ...We conclude that the interests of justice support an exception to our firm waiver rule. We therefore proceed to the merits of this appeal."
> *Wirsching v. Colorado*, 360 F.3d 1191, 1197 (10th Cir. 2004)

> "There is no suggestion of denial that the State Highway Department of the state of Colorado is a body corporate and a division of the executive department of the state...that does not change its status from that of an agency of the government with liability to any citizen who may be deprived of his property without due process of law, or who may be deprived of his property without just compensation ..."When a citizen resorts to our courts having jurisdiction and has alleged his right to property, he owes deference to no power that would seek to

prevent him from having the ear of the court in praying for an enforcement of a right."
Boxberger v. State Highway Department, 25 Colo. 438 (1952) 250 P.2d 1007. #16,606 Supreme Court of Colorado

PETITIONERS' CONCLUSIONS

ISSUE 3

Issue (3). It is clear that there is plain error here and it seriously and substantially affects the fairness, integrity, and public reputation of judicial proceedings.

It is in the interests of justice, fairness and the reputation of judicial proceedings not to punish Petitioners for the predictable consequences of court officers, lawyers and judges conducting trials and making rulings, charging large fees and yet not knowing deeply in their souls the United States and Colorado Constitutions, the rights of citizens, and the laws and statutes relevant to the cases they prosecute.

Petitioners respectfully urge this honorable Court to grant a plain error exception to res judicata and claim preclusion in this case in the interests of justice and fairness, together with whatever redress to Petitioners that the Court deems appropriate.

Respectfully submitted. this 2nd day of October, 2009.

Elaine Spencer Marr

Elaine Spencer Marr, Pro Se
Petitioner

Elliott Paul Moore

Elliott Paul Moore, Pro Se
Petitioner

204 Grant Street
Socorro, New Mexico 87801
Phone: (575) 835-2008

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELAINE SPENCER MARR; ELLIOTT PAUL MOORE, Plaintiffs - Appellants v. LARRY H. HUGHES; TOMMIE R. HUGHES, COLORADO DEPARTMENT OF TRANSPORTATION, Defendants - Appellees	No. 08-1378

ORDER

Before **Kelly, McKay**, and **Briscoe,** Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ELAINE SPENCER MARR; ELLIOTT PAUL MOORE, Plaintiffs - Appellants v. LARRY H. HUGHES; TOMMIE R. HUGHES, COLORADO DEPARTMENT OF TRANSPORTATION, Defendants - Appellees	No. 08-1378 (D.C. No. 1:07-CV-01746-WYD-KMT) (D.Colo.)

ORDER AND JUDGMENT*

Before **Kelly**, **McKay** and **Briscoe**, Circuit Judges.

Elaine Spencer Marr and Elliott Paul Moore appeal the dismissal of their "Petition for Redress" as barred by the principles of claim preclusion and res judicata. Our

*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P.34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

jurisdiction arises under 28 U.S.C. Sec. 1291, and we affirm.

The magistrate judge provided a detailed summary of this case's facts and procedural history, R., Vol III, Doc. 33 at 2-5, and we need not restate either in detail here. Suffice it to say that Marr and Moore's appeal stems from their continued efforts to challenge the 2002 modification of an easement. In July 2004, they filed suit in Colorado state court against Larry H. Hughes, Tommie R. Hughes, and the Colorado Department of Transportation (CDOT), claiming trespass and seeking various forms of relief. In September 2005, the Chaffee County Colorado District Court issued its Findings and Verdict on Trial to the Court. Marr and Moore prevailed on three of their six claims against the Hugheses, while the CDOT prevailed on Marr and Moore's single claim against it.

Then in August 2007, Marr and Moore filed in federal district court the "Petition for Redress," asserting their property was taken and damaged without notice, in violation of their state and federal due process rights. The case was referred to a magistrate judge who recommended dismissal of the case as barred by claim preclusion and res judicata, stating: "The two cases before the Court are identical. The parties and subject matter are the same. The only difference in this federal action is the legal theory upon which the plaintiffs now wish to proceed." *Id.* At 12; *see also id.* (Observing that res judicata "bars relitigation not only of all issues actually decided, but of all issues that might have been decided" (quotation omitted)).

On de novo review, the district court agreed with the magistrate judge's analysis and affirmed and adopted her recommendation. This appeal followed. Liberally construing Marr and Moore's pro se appellate filings, *Cummings v. Evans*, 161 F.3d 610, 613 (10th Cir. 1998), they apparently assert that (1) the interests of justice require this court to review their case, (2) the denial of their right to due process constitutes a separate cause of action that was not mentioned or litigated in state court, and (3) they were not given a full and fair opportunity to litigate their due process claim(s) in state court.

We review de novo the district court's dismissal of Marr and Moore's case, *MACTEC, Inc.* v. *Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005) ("The application of res judicata is a question of law which we review *de novo*," (citing *Satsky* v. *Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1467-68 (10th Cir. 1993)).

> "The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute," 28 U.S.C. Sec. 1738, which directs a federal court to refer to the preclusion law of the State in which judgment was rendered." *Marrese* v. *Am. Acad. Of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985).

Brady v. *UBS Fin. Servs, Inc.*., 538 F.3d 1319, 1327 (10th Cir. 2008). Colorado rendered the judgment that the federal district court considered in dismissing Marr

and Moore's case. We therefore apply the res judicata rules of Colorado *Id.*.

In Colorado, claim preclusion, or res judicata, "bars relitigation of claims or issues which were or could have been raised in a prior suit between the same parties. " *Rantz* v. *Kaufman*, 109 P.3d 132, 138 (Colo. 2005) (quotation omitted). Indeed, it is "an absolute bar to relitigation. . . when, in both the prior and subsequent suits, there is identity of subject matter, identity of cause of action, identity of parties to the action, and identity of capacity in the persons against whom the claim is made." *Upper Eagle Reg'l Water Auth.* v. *Simpson*, 167 P.3d 729, 736 (Colo. 2007).

Having reviewed the briefs, the record, and the applicable law pursuant to the above-mentioned standards, we hold that Marr and Moore have failed to identify any reversible error in this case. We therefore AFFIRM the judgment of the district court for substantially the same reasons set forth in the magistrate judge's recommendation and in the district court's order accepting and affirming the magistrate judge's recommendation.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 07-cv-01746-WYD-KMT

ELAINE SPENCER MARR, and
ELLIOTT PAUL MOORE,

Plaintiffs,

v.

LARRY H. HUGHES,
TOMMIE R. HUGHES,
and COLORADO DEPARTMENT OF TRANSPORTATION,

Defendants.

JUDGMENT

Pursuant to and in accordance with the Order Accepting and Affirming Recommendation of United States Magistrate Judge, filed on September 16, 2008, by the Honorable Wiley Y. Daniel, United States District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that judgment is hereby entered in favor of

Defendants, Larry H. Hughes, Tommie R. Hughes, and Colorado Department of Transportation, and against Plaintiffs, Elaine Spencer Marr and Elliott Paul Moore, on Defendants' motions to dismiss. It is further

ORDERED that plaintiff's complaint and action are dismissed with prejudice.

DATED at Denver, Colorado this 17th day of September, 2008.

FOR THE COURT.

GREGORY C. LANGHAM, CLERK

s/ Edward P. Butler

Edward P. Butler,
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 07-cv-01746-WYD-KMT

ELAINE SPENCER MARR
ELLIOTT PAUL MOORE

Plaintiffs,

v.

LARRY H. HUGHES,
TOMMIE R. HUGHES

Defendants.

ORDER ACCEPTING AND AFFIRMING RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

THIS MATTER is before the Court on Defendant Larry and Tommie Hughes' Motion to Dismiss, filed September 10, 2007 (docket #7); Defendant Colorado Department of Transportation's Motion to Dismiss, filed October 30, 2007 (docket #25). On January 9, 2008, pursuant to General Order upon the appointment of Magistrate Judge Tafoya, this case was reassigned to Magistrate Judge Tafoya. Magistrate Judge Tafoya issued a Recommendation on August 15,

2008, which is incorporated herein by reference. See 28 U.S.C. Sec. 636(b)(1), FED.R.Civ. P. 72(b), D.C.Colo.LCivR. 72.1. Magistrate Judge Tafoya recommenced therein that this case be dismissed against Defendants Larry and Tommie Hughes and against Defendant Colorado Department of Transportation (hereinafter "CDOT"). She also recommended that Petitioners' Motion for Summary Judgment be denied.

More specifically, Magistrate Judge Tafoya found that Plaintiffs claims are barred by the principles of claim preclusion and res judicata. Recommendation at 13. Magistrate Judge Tafoya noted that the Plaintiffs want "A ruling from this Court...which confirm Petitioners' claim that they were indeed denied their assertions that they were denied their United States and Colorado's Consititutional right of due process...." Recommendation at 11 (citing Pet. Rsp. Hughes, p. 22). Magistrate Judge Tafoya found that the Plaintiffs have already received the "declaration" they desire in this case from District Court Judge Charles M. Barton and what the Plaintiffs really seek by filing this new case is a different remedy than Judge Hughes was willing to apply in the state court action. Id. In determining that this action is barred by claim preclusion and res adjudicata, Magistrate Judge Tafoya found that the two cases before the Court are identical and the parties and subject matter are the same. Id. The only difference in this action is the legal theory upon which the Plaintiffs now wish to proceed. Id. ((Citing *State Engineer v. Smith Cattle, Inc.* 780 P.2d 546, 549 (Colo. 1989)(emphasis added)("Of paramount importance to

this case is that in Colorado, the 'same claim or cause of action is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies."))((see also *Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997)("[A] cause of action includes all claims or legal theories of recovery that arise from the same transaction, event or occurrence)).

On August 29, 2008, Plaintiffs filed a timely Objection entitled "Plaintiff's Response to Recommendation of United States Magistrate Judge Kathleen M. Tafoya." Plaintiff's objections necessitate a *de novo* determination as to those specified proposed findings or recommendations to which objection is made since the nature of the matter is dispositive. FED.R.CIV.P. 72(b), 28 U.S.C. Sec. 636(b)(1).

In their Objection, Plaintiffs provide a lengthy restatement of the facts surrounding their state court action. Plaintiffs argue that a cause of action based on the failure of Defendants to provide Plaintiffs with constitutionally mandated due process of law prior to taking their property was not asserted when the case was filed. Plaintiffs assert that during the trial of their case there was no mention of the fact that Plaintiffs' were intentionally denied their Constitutional right of due process of law by the Defendants. Plaintiffs contend that this constitutional issue is a new, separate and serious cause of action and it is an issue that was not addressed. Plaintiffs also request that Plaintiffs' Petition for Redress be granted, which includes the return to them of their easement to its

original location.

I agree with Magistrate Judge Tafoya that Plaintiffs' Petition for Redress is barred by the principles of claim preclusion and res judicata. Not only is there an identity of parties and subject matter in this case, but Plaintiffs also seek a remedy that was already denied in their state court action, namely the return to them of their easement to its original location. Although Plaintiffs are asserting a new legal theory for their claim, the injury for which relief is demanded is the same. Finally, I have reviewed the remaining objections in their entirety and find no merit to any other arguments therein. Accordingly, the Recommendation is affirmed and adopted.

Based upon the foregoing, it is

ORDERED that the Recommendation of United States Magistrate Judge (docket #33) is AFFIRMED AND ADOPTED. In accordance therewith, it is

ORDERED that Defendant Larry and Tommie Hughes' Motion to Dismiss (docket #7) is GRANTED. It is

FURTHER ORDERED that Defendant Colorado Department of Transportation's Motion to Dismiss (docket #8) is GRANTED. It is

FURTHER ORDERED that Petitioners' Motion for Summary Judgment (docket #17) is DENIED. It is

FURTHER ORDERED that this case is DISMISSED

WITH PREJUDICE.

Dated: September 16, 2008

BY THE COURT:

Wiley Y. Daniel
U.S. District Judge

APPENDIX E

SUPREME COURT STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 CERTIORARI TO THE COURT OF APPEALS, 06CA1080 DISTRICT COURT, CHAFFEE COUNTY, 04CV79	CASE NO. 06SC613
Petitioners: ELAINE SPENCER MARR and ELLIOTT PAUL MOORE v. Respondent: LARRY H. HUGHES, TOMMY R. HUGHES, and COLORADO DEPARTMENT OF TRANSPORTATION	
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 2, 2007
John Doerner,
Clerk of the Court of Appeals

APPENDIX F

COLORADO COURT OF APPEALS ORDER
No. 06CA1080 Tr. Ct. No. 04CV79

Elaine Spencer Marr and Elliott Paul Moore
Plaintiff-Appellants,

v.

Larry H. Hughes, Tommie R. Hughes, and
The Colorado Department of Transportation
Defendant-Appellees

Upon consideration of the motions to dismiss filed by appellees and the response filed by appellant Elaine Spencer Marr, the Court GRANTS the motion and dismisses the appeal for failure to timely file the notice of appeal. The Court finds that the district court's order of September 14, 2005, was a final and appealable order and that the district court's adoption of the easement decree was ministerial in nature. Therefore any notice of appeal was due 45 days after the district court's order of December 9, 2005, denying C.R.C.P. 59 relief, which was January 23, 2006. Moreover, this Court may grant an extension of time to file a notice of appeal of only 30 days, and that period expired on February 22, 2006. Therefore, the petition for writ of certiorari, which was transferred to this Court by the supreme court and which this Court accepts as the notice of appeal, filed on May 23, 2006, was not timely.

BY THE COURT:

Vogt, J.
Bernard, J.

Taubman, J. dissents. I would allow the appeal to proceed.

Dated: August 16, 2006

APPENDIX G

SUPREME COURT STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 DISTRICT COURT, CHAFFEE COUNTY, 04CV79	No Case # ASSIGNED
Plaintiffs: ELAINE SPENCER MARR and ELLIOTT PAUL MOORE v. Defendants: LARRY H. HUGHES, TOMMY R. HUGHES, and COLORADO DEPARTMENT OF TRANSPORTATION	
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises;

IT IS ORDERED that said case is TRANSFERRED to the Court of Appeals pursuant sec. 13-4-110(3), C.R.S. (2005).

BY THE COURT, MAY 26, 2006.

APPENDIX H

DISTRICT COURT, CHAFFEE COUNTY COLORADO 142 Crestone Avenue P.O. Box 279 Salida, CO 81201	Filed in Combined Courts SEP 14 2005 Chaffee County Colorado COURT USE ONLY
Plaintiffs: ELAINE SPENCER MARR and ELLIOTT PAUL MOORE vs. Defendants: LARRY H. HUGHES, TOMMIE R. HUGHES and COLORADO DEPARTMENT OF TRANSPORTATION	CASE # 04CV79
FINDINGS AND VERDICT ON TRIAL TO COURT	

THIS MATTER CAME ON FOR TRIAL TO THE COURT on September 8, 2005. Plaintiffs appeared with Mr. Craig Joyce. Defendants Hughes appeared with Mr. Colin Campbell. Defendant CDOT was represented by Mr. Skippere Spear.* The court admitted by stipulation plaintiffs' exhibits 1 to 30 and defendants' exhibits A to N. The court heard testimony from Mr. Larry Hughes, Ms. Elaine Spencer Marr, Ms. Jeanne Foster, and Ms. Melinda Ice.

THE COURT FINDS BY A PREPONDERANCE OF THE EVIDENCE:

Ms. Marr is the owner of Tract 3, a parcel of land which borders the Hughes' property. The tract is served by a 14 feet wide easement which runs straight along the eastern border of the Hughes' property, terminating at Highway 50. It is described by metes and bounds in the deed to Hughes' property which they acquired in 1993. Ms. Marr acquired tract 3 in 1971. Title to Tract 3 was quieted in Ms. Marr's name in Chaffee County District Court case no. 82CV8 in 1982, including the easement. The easement grants rights of ingress and egress. There has been for at least 25 years a utility pole situated approximately 5 feet into the easement from its eastern boundary near its southern terminus.

Ms. Marr has continually used the tract for

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* For purposes of this finding and order, and for the sake of brevity, will only refer to Mr. Hughes and Ms. Marr, although Dr. Elliott Moore and Mrs. Tommie Hughes are also parties.

agricultural purposes since its purchase. She has not personally occupied the property since 1977. She has regularly leased it in exchange for the tenants irrigating the property.

Mr. Hughes is a real estate broker of many years and employs a dozen agents. In 2002 he began to convert his property, which borders on Highway 50 in Salida, from a trailer park to a real estate office. The trailer park had two entrances onto Highway 50, on its eastern and western boundaries. The eastern boundary entrance corresponded to the Marr easement.

Mr.Hughes applied for an access permit from CDOT on May 16, 2002. CDOT denied the application on June 27, 2002. In its denial letter CDOT informed Mr. Hughes that it would grant a single acess of 30 to 40 feet in width where he chose on the frontage provided it did not interfere with the Marr easement. Mr. Hughes submitted a second application on July 18, 2002. It proposed an access in the center of the property. This was based upon Mr. Hughes' architect's design to accommodate surface water drainage requirements.

CDOT was aware of the easement as of the first application. See Exhibit 7. It requires the applicant, the fee owner, to notify persons who may be affected by the application according to local authorities' requirements. There was no evidence of what notice is required by local authorities.

Mr. Hughes checked the "no" box on the application

forms in response to the question: "Are there other existing or dedicated public streets, roads, highways or access easements bordering or within the property?" He took that as referring to access from the Hughes property to other public roads, not the Marr easement because CDOT was aware of it.

Mr. Hughes sent to Ms. Marr a copy in July 2002 of the face sheet of the 2nd application (Exhibit 8) and a site map of the proposed locations of changes to his property including the realignment of the easement (Exhibit C). Mr. Hughes and Ms. Marr had a phone conversation on July 29, 2002 regarding the easement. No agreement was reached. The parties had no other contact until April 16, 2003.

CDOT granted an access permit to Mr. Hughes on September 10, 2002. It allows access to Mr. Hughes for his business purposes and to Ms. Marr for agricultural purposes.

Site work began in early 2003. During the construction, contractors parked their vehicles and placed materials upon Tract 3. Apparently they knocked down portions of Ms. Marr's fence and removed a culvert from a water ditch. Ms. Marr testified that she paid $100 to repair the fence and it would cost approximately $100 to $200 to reinstall the culvert.

Between April 16, 2003 and June 30, 2003 Mr. Hughes and Ms. Marr discussed the easement and Ms. Marr expressed her refusal to consent to a change of its

location. Mr. Hughes offered to install utility conduit to provide utility access in the future to the Marr property but reached no agreement. Mr. Hughes offered to convey to Ms. Marr a deeded easement which conformed to the access permit but she did not accept.

Without obtaining either court outhorization or Ms. Marr's consent, Mr. Hughes constructed improvements to his property consistent with the access permit. Curbs, sidewalk, water meter, landscaping and signage were placed in the easement at its southern terminus of the Hughes property. These improvements prevent use of the easement. Mr. Hughes acknowledges that he violated the easement and his actions are without legal justification.

Ms. Marr seeks legal and equitable relief. She asks the court for injunctive relief for the removal of the Hughes' obstructions to her easement, for injunctive relief that the easement may not be disturbed, for damages for trespass on Tract 3, for declaratory relief that the easement is to be honored according to its terms, for injunctive relief that CDOT revoke the access permit and restore access consistent with the easement, for Rule 105 C.R.C.P. relief adjudicating all rights relating to the easement, and for exemplary damages against Mr. Hughes.

The court will briefly summarize the law which is applicable. Generally, neither party to an easement may unilaterally change the easement. *Roaring Fork Club, L.P.* v. *St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001). When a party does unlawfully interfere with an

easement the court has wide discretion to fashion legal and equitable relief. *Id.* Such relief may include restoration of the easement, modification of the easement, and damages. "When an easement exists, so does a dichotomy of interests which must be respected and, as nearly as possible, kept in balance. On the one hand, the owner of land burdened by an easement has a qualified right to put his or her property to any lawful use for which it may be adapted. However, the servient owner cannot unreasonably interfere with the superior right of the person possessing the easement." *Lazy Dog Ranch* v. *Telluray Ranch Corp.*, 923 P.2d 313, 316 (Colo.App.1996). "In fashioning a remedy between the owners of the dominant and servient estates, effecting a compromise between the parties' positions is often the best resolution of an easement question." *Strole* v.*Guymon*, 37 P.3d 529, 533 (Colo. App. 2001).

Some of the factors the court has considered are: the benefits and disadvantages to the dominant and servient estates from the relocation, the conduct of the parties, the cost of restoration relative to the benefit gained, and actual damages.

Here, if the court were to order restoration of the easement, that is, removal of the improvements on the Hughes property, so that Ms. Marr can travel over the entirety of the original easement, it would cost approximately $5,000 to $6,000. Ordering it to be done would result in no benefit to Ms. Marr; rather, she would be in a worse position because she would have no access to Highway 50.

Ms. Marr has no right to access Highway 50 at the specific location of the original easement. CDOT may, under sec. 43-2-147(6)(b) C.R.S., relocate a driveway when there is a change in the type of driveway operation. The statute applied regardless of when the easement was created. There has been such a change in the use of the Hughes property on which the easement is located. It has changed from a residential use to a commercial one.

Further, restoring the original easement would mean that Ms. Marr would effectively have a 9 foot easement given the fact that a utility pole obstructs at least the eastern 5 feet. There is no evidence before the court that the pole could be moved. Not only will CDOT not issue a permit for a second entrance, the width of the easement does not meet the CDOT criteria and no permit could be obtained for that reason as well. See State Highway Access Code,2 C.C.R. 601-1, sec. 4.5.

Clearly, the alternative equitable remedy of compelling Mr. Hughes to grant a deeded easement which conforms to the conditions now in place is the reasonable remedy. Except for the fact that the new easement would not be the same as the original, there is no proof that the new easement is less valuable. In fact, the new easement is more valuable in that it is now paved and is not obstructed by any utility poles.

The question then becomes: what are the damages properly to be assessed? The actions of Mr. Hughes were unilateral and, as a sophisticated businessman familiar with real estate matters, he well understood

and admits that his actions violated the easement rights of Ms. Marr by constructing his improvements in a manner which blocked the easement. He acted purposefully, knowing that he did not have Ms. Marr's consent. Mitigating factors are that he notified her of his intentions, he offered to provide utility access through his property, he offered a new deeded easement, and his actions caused no harm to the easement.

The Colorado Supreme Court expressly disapproved of unilateral changes to easements in *Roaring Fork Club, L.P.* v. *St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001). This court is bound by its directive. Further, landowners whose property is encumbered by an easement have available the remedy of seeking declaratory or injunctive relief if they find thay cannot reach agreement with the owner of the easement where changes would benefit the servient land without significant detriment to the easement. *Lazy Dog Ranch* v. *Telluray Ranch Corp.*, 923 P.2d 313, 316 (Colo.App.1996).

The court understands Ms. Marr's position. Her legal right to rely upon the express terms of the easement was willfully trampled upon by Mr. Hughes. Nonetheless, there are no actual damages to the easement in that it is no less valuable now that it was previously. Ms. Marr may, under the terms of this order, still exercise the same enjoyment on the new easement as she did on the original. Therefore actual damages must be nominal, i.e., one dollar.

Exemplary damages for interference and alteration of the easement are appropriate given the court's findings above. The court finds that plaintiffs have established by proof beyond a reasonable doubt that Mr. Hughes' conduct was willful. The court is limited to an award of $1 for exemplary damages unter sec. 13-21-102(1)(a), C.R.S. *Sky Fun I* v. *Schuttloffel,* 27 P.3d 361 (Colo. 2001). The facts do not support any increase in exemplary damages under sec. 13-21-102(3)(a) or (b), C.R.S.

The damages for trespass upon Tract 3 are for repair of the fence and replacement of the culvert. They total $300. The court does not find that Mr. Hughes' conduct was willful in the trespass upon Tract 3. The actions of the contractors were not shown to be at his direction and the trespass was remedied when brought to his attention. Therefore, no exemplary damages are awarded in addition to the $300.

There is no evidence that CDOT acted contrary to statute or regulation and therefore no proof that it failed to do a duty it is obligated to do or did an act it was not lawfully permitted to do.

THEREFORE, IT IS THE VERDICT AND JUDGMENT OF THE COURT THAT:

First Claim for Relief: Defendants Hughes shall execute, deliver to plaintiffs, and record a grant of an easement for Tract 3 for ingress and egress of 14 feet in width which conforms to the eastern drivable portion of the Hughes property. This shall be completed within

30 days of this order. Actual nominal damages of $1 are awarded to plaintiffs from defendants Hughes.

Second Claim for Relief: Defendants Hughes are permanently enjoined from any acts hereafter which cause impairment, interference, or damage the easement to Tract 3.

Third Claim for Relief: Defendants Hughes shall pay damages of $300 to plaintiffs for trespass to Tract 3.

Fourth Claim for Relief: Plaintiffs' request for declaratory relief is denied.

Fifth Claim for Relief: Plaintiffs' request for injunctive relief against CDOT is denied.

Sixth Claim for Relief: The status of the easement of Tract 3 shall be consistent with this verdict and order with the same rights and obligations as prior to its modifiction except as to location.

Seventh Claim for Relief: Exemplary damages of $1 are awarded to plaintiffs.

DONE THIS 14TH DAY OF SEPTEMBER, 2005.

Charles M. Barton
District Court Judge

APPENDIX I

Amended Decree Case No. 82 CV 8 filed for Record Nov. 24, 1982 in Book 453, Page 322-324 Reception No. 218278, of the Records of Chaffee County Colorado.

DISTRICT COURT, COUNTY OF CHAFFEE, STATE OF COLORADO
Case No. 82 CV 8
AMENDED DECREE

ELAINE SPENCER MARR, a/k/a ELAINE S. BERNICK

Plaintiff,
vs.
Heirs and Devisees of SUSIE CULP, Heirs and Devisees of EARL G. EVERETT and Heirs and Devisees of ELLA EVERETT, Heirs and Devisees of STELLA K. HUGHES, ELVIN L.CRONE and VIRGINIA L. CRONE, FRANK M. KINZA and BONNIE L. LINZA, JOHN W. HUGHES and STELLA K. HUGHES, ELLEN L. McGOWAN, CARO: JEAN STEELE, DAVID DAVIDOFF and GOLDIE DAVIDOFF, CHARLES R. CULP and VERNA M. CULP, BUTALA CONSTRUCTION COMPANY, STATE OF COLORADO, AND ANY AND ALL UNKNOWN PERSONS WHO CLAIM ANY INTEREST IN THE SUBJECT MATTER OF THIS ACTION,

Defendants.

THIS MATTER heard this day.

THE COURT FINDS that each Defendant herein has been properly served as required by law and rule of Court: that Robert P. Rush, Attorney at Law, has been heretofore appointed and appeared for any and all Defendants who are in, or who may be in, or who may have been ordered to report for induction into, the military services as defined by the Soldiers' and Sailors' Civil Relief Act of 1940, as Amended; that this is an action in rem affecting specific real property; that the Court has jurisdiction of all parties to this action and of the subject matter thereof; that the allegations of the Complaint are true; that every claim made by said Defendants is unlawful and without right; that no Defendant herein has any title or interest in or to the property described herein or any part thereof; therefore:

IT IS ADJUDGED AND DECREED THAT Elaine Spencer Marr a/k/a Elaine S. Bernick, Plaintiff, at the time of the commencement of this proceeding, is and she now is the owner in fee simple, with right to possession, of the following real property in Chaffee County, Colorado:

Tract 1:..

Tract 2:...

Tract 3: A tract of land located in the Northwest 1/4 of the Southeast 1/4 of Section 6, Township 49 North, Range 9 East of the New Mexico Principal Meridian,

Chaffee County, Colorado, described as follows:

Beginning at the northwest corner of said tract from whence the brass capped witness corner for the North 1/4 Corner of said Section 6 is located first North 84° 02' West 560.4 feet, thence North 1° 02' East 283.1 feet, and then North 0° 37' East 3008.5 feet to said witness corner (from said witness corner the true 1/4 Corner bears South 14.52 feet); said northwest tract corner being marked, as are the other 3 tract corners, by a 5/8 inch steel reinforcing bar 2 feet long driven in the ground and having a 1 ½ inch aluminum cap; thence proceeding around the tract South 84° 02' East 139.8 feet; thence South 0° 21' West 214.2 feet to the southeast corner of said tract; thence North 89° 31' West 138.7 feet; thence North 0° 13' East 227.5 feet to the point of beginning.

Together with the right of ingress and egress over a roadway easement 14 feet in width; the east line of said easement being described as follows: Beginning at the southeast corner of the above described tract thence South 0° 18' West 326.4 feet to the northerly right-of-way boundary of U.S. Highway No. 50.

Dated: November 22, 1982.

BY THE COURT:

/s/ O. Edward Schlatter
District Judge

Supreme Court, U.S.
FILED
09-477 OCT 2 - 2009
OFFICE OF THE CLERK

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(2)

No.

IN THE
SUPREME COURT OF THE UNITED STATES

ELAINE SPENCER MARR, Pro Se
and ELLIOTT PAUL MOORE, Pro Se,
Petitioners,

v.

LARRY H. HUGHES, TOMMIE R. HUGHES,
and THE STATE OF COLORADO DEPARTMENT
OF TRANSPORTATION,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL APPENDIX J.

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APPENDIX J.
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-01746-WYD-KMT

ELAINE SPENCER MARR, and
ELLIOTT PAUL MOORE,

Plaintiffs,

v.

LARRY H. HUGHES,
TOMMIE R. HUGHES, and
THE COLORADO DEPARTMENT
OF TRANSPORTATION

Defendants.

RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Kathleen M. Tafoya
United States Magistrate Judge

This case comes before the court on three pending motions: 1) "Defendant Larry and Tommie Hughes' Motion to Dismiss" [Doc. No. 7, filed September 10,

2007], to which Plaintiff's responded with "Petitioners' Response to Defendants Larry H. Hughes' and Tommie R. Hughes' Motion to Dismiss" ("Pet. Rsp. Hughes" [Doc. No. 29, filed November 30, 2007]); 2) "Defendant Colorado Department of Transportation's Motion to Dismiss" [Doc. No. 8, filed September 10, 2008] to which Plaintiffs responded with "Petitioners Response to Defendant Colorado Department of Transportation's Motion to Dismiss" ("Pet. Rsp. CDOT" [Doc. No. 19, filed October 30, 2007]). Defendant Colorado Department of Transportation (hereinafter "CDOT") filed a Reply on November 14, 2007 [Doc. No. 24]; and 3) "Petitioners' Motions for Summary Judgment" [Doc. No. 17, filed October 30, 2007] to which only CDOT responded on November 19, 2007 [Doc. No. 25].

I. Background

Plaintiffs Elaine Spencer Marr and Elliott Paul Moore, appearing pro se, are the owners of a 14 foot wide easement granting ingress and egress from Plaintiffs' farmland to U.S. Highway 50. (Petition For Redress ["Petition", Doc. No. 1], p.6, sec. 14; p. 37, secs. 92-3.) The Hughes Defendants own an adjoining tract of land (*Id.* at p.38, sec. 94.) Marr and Moore's easement "runs straight along the eastern border of the Hughes' property, terminating at Highway 50." (Petition, Addendum A, Findings and Verdict on Trial to Court ("Add. A"), p.1.) The easement grants rights of ingress and egress and "has, for at least 25 years, a utility pole situated approximately 5 feet into the easement from its eastern boundary near its southern terminus." (*Id.*)

In 2002, the Hughes sought a permit from CDOT for a change in access use. (Petition, pp. 39-42.) The access permit consolidated the direct access to Highway 50 enjoyed by both the dominant (Hughes) and servient (Marr/Moore) estates. ("Add. A", p.2.) The permit, however, also required that part of Plaintiffs' easement, an existing curb-cut facilitating access to Highway 50, be closed. (Petition, p. 42, secs. 104-105). It is undisputed the Hughes did not obtain consent from the plaintiffs before going to CDOT for the approved permit, and further, it is undisputed that Plaintiffs were not consulted during the review process or prior to approval being granted for the permit relocation. ("Pet. Rsp. Hughes" p. 11.) CDOT granted an access permit to Hughes on September 10, 2002. ("Add. A," p.2.)

Plaintiffs filed suit in state court on July 12, 2004 claiming trespass damages and injunctive relief for what was characterized as Hughes' unilateral alteration of the easement location (Petition for Redress, p. 7-8, sec. 17, 20.) The court summarized the plaintiffs' claims as:

> Ms. Marr seeks legal and equitable relief. She asks the court for injunctive relief for the removal of the Hughes' obstructions to her easement, for injunctive relief that the easement may not be disturbed, for damages for trespass on Tract 3, for declaratory relief that the easement is to be honored according to its tems, for injunctive relief that CDOT revoke the access permit and restore access consistent with

> the easement, for Rule 105 C.R.C.P. relief adjudicating all rights relating to the easement, and for exemplary damages against Mr. Hughes.

("Add.A," p.3.)

After a trial, on September 8, 2005, the Colorado District Court for Chaffee County issued its findings and ruling. ("Add. A.") The court found that although the Marr/Moore plaintiffs did not consent to the moving of the easement, Mr. Hughes had sent Marr a copy of the face sheet of the second application to CDOT showing the proposed realignment of the easement. (Add. A," p.2.) The court also found that during the construction of the new easement, including paving the road, contractors had inadvertently damaged the Marr/Moore property by removing a culvert from a water ditch and knocking down portions of fencing. (*Id.)* Although Mr. Hughes and Ms. Marr discussed the relocation of the easement on several occasions during the construction beginning in April 2003, Ms. Marr continued to express her refusal to consent to a change of the location. (*Id.*, p.3.) The court further found that Mr. Hughes admitted he willfully violated the prior easement held by the plaintiffs and constructed improvements such as curbs, sidewalk, water meter, landscaping and signage which rendered the easement unusable. (*Id.*)

The Court found the Hughes Defendants had violated the easement and therefore had committed a trespass and awarded Plaintiffs $300 in damages for the repair of the fence and replacement of the culvert, and $1.00

in exemplary damages because Mr. Hughes' actions in violating the easement were willful. (Petition, p.8, secs. 20-1; "Add. A," p.5.) The court noted the Hughes Defendants caused no harm to the easement and in fact, the easement as realigned was more valuable in that it now was paved and no longer obstructed by any utility poles. ("Add. A," p.4.) The court also found, however, that Plaintiffs had no right to access Highway 50 at the specific location of the original easement and that they had no right to unreasonably interfere with the superior right to the land held by Hughes. ("Add. A," 3-4.)(emphasis added).

The court granted partial injunctive relief against Defendants Hughes and ordered the Hughes to execute and record a grant of an easement over Tract 3 in accord with the improvements made. (*Id.*, p.5.) Defendants Hughes were ordered to pay damages as noted and the Hughes were permanently enjoined from any acts which would cause impairment or damage to the newly relocated easement benefitting the Marrs/Moore property. (*Id.)* The court denied the plaintiffs' request for declaratory relief and, in weighing the "benefits and disadvantages to the dominant and servient estates from the relocation, the conduct of the parties, the cost of restoration relative to the benefit gained and actual damages" found that the cost of $5,000-$6,000 to restore the original easement was unreasonable, especially since it "would result in no benefit to Ms. Marr." (*Id.)* The court declined to order that the original easement be restored after this careful analysis. (*Id.)*

The court completely rejected all Plaintiffs' claims against CDOT finding there was "no evidence that CDOT acted contrary to statute or regulation and therefore no proof that it failed to do a duty it is obligated to do or did an act it was not lawfully permitted to do." (*Id.*, p.5; Petition, sec. 23).

Plaintiffs filed a Petition for Writ of Certiorari with the Colorado Supreme Court on May 23, 2006. (Petition, p.73, sec. 294, Addendum F.) The Court transferred the Petition to the Colorado Court of Appeals who dismissed the appeal as untimely. (*Id.* at p. 74-75, sec. 298-99; Addendum H.) The Colorado Supreme Court later affirmed the dismissal. (*Id.* At p. 75, sec. 300; Addendum I.)

Plaintiffs' claims in the instant action include, apparently, "the intentional denial to Petitioners of their United States and Colorado Constitutional Right of due process when Petitioners' property was taken and damaged without Notice to Petitioners by the Defendants Hughes and CDOT," (Pet. Mot. S.J., p.3.) Plaintiffs cite to Colorado Revised Statutes, Title 38 and to Title 42, United States Code, sec. 1983 as the grounds to pursue this federal case. ("Pet. Rsp. Hughes," p. 2,4.) In addition to the complaints about the actions of the Hughes Defendants which are the same as presented to the Chaffee County State District Court, Plaintiffs complain CDOT's access permit granted in favor of the Hughes Defendants unconstitutionally denied them of their property interest. (Petition, p.4, secs. 10, 17.)

II. Standard of Review

A. Pro Se Plaintiff

The plaintiffs are proceeding *pro se*. The court, therefore, "review[s] [their] pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). See also *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (holding allegations of a *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers"). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendnt has violated laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). See also *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir 1997) (court may not "supply additional factual allegations to round out a plaintiff's complaint"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). The plaintiffs' *pro se* status does not entitle her to application of different rules. See *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

B. Fed. R. Civ. P. 12(b)(1)

Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case. Rather, it calls for a determination that the court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of the complaint. See *Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking."See *Basso*, 495 F.2d at 909.

A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusory allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). When considering a Rule 12(b)(1) motion, however, the Court may consider matters outside the pleadings without transforming the motion into one for summary judgment. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir 1995). Where a party challenges the facts upon which subject matter jurisdiction depends, a district court may not presume the truthfulness of the complaint's "factual allegations...[and] has wide discretion to allow affidavits, other documents, and [may even hold] a limited evidentiary hearing to resolve disputed

jurisdictional facts under Rule 12(b)(1). "*Id.*

C. Fed. R. Civ. P. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6) (2007)."The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial,but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*,336 F.3d 1194, 1201 (10th Cir. 2003) (citations and quotation marks omitted).

Thus, all well-pled factual allegations in a complaint are accepted as true and construed in the light most favorable to the plaintiff. *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007). Further, the court is to make all reasonable inferences in the plaintiff's favor. *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1204 (10th Cir. 2002). In doing so, the Court distinguishes well-pleaded facts from conclusory allegations. *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002) (citations omitted).

In *Bell Atlantic Corp. V. Twombly*, -U.S.-, 127 S. Ct. 1955, 1974 (2007), the Supreme Court articulated a new "plausibility" standard, under which a complaint must include "enough facts to state a claim to relief that is plausible on its face." 127 S. Ct. At 1974. The issue in reviewing the sufficiency of a plaintiff's complaint is not whether the plaintiff will prevail, but

whether the plaintiff is entitled to offer evidence to support his claims. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (*overruled on other grounds by Harlow v. Fitzgerald*, 457, U.S. 800 (1982)). In evaluating a 12(b)(6) motion to dismiss, it is appropriate to look to whether the plaintiff has alleged each element necessary to establish a prima facie claim on which relief can be granted. See *Ruiz*, 299 F.3d at 1182-83.; *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902-903 (10th Cir. 1997). Although a plaintiff does not need to state each element of his claim precisely, he must plead minimal factual allegations on those material elements that must be proved. See Fed. R. Civ. P. 8(a); *Hall*, 935 F.2d at 1110.

D. Summary Judgment

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (2006); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter."

Concrete Works, 36 F.3d at 1518 (citing *Celotex*, 477 U.S. at 325). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex* 477 U.S. at 324, see Fed. R. Civ. P. 56(e)(2006). A fact in dispute is "material" if it might affect the outcome of the suit under the governing law; the dispute is "genuine" if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997) citing *Anderson*, 477 U.S. at 248). The court may consider only admissible evidence when ruling on a summary judgment motion. See *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir.1985). The factual record and reasonable inferences therefrom are viewed in the light most favorable to the party opposing summary judgment. *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998) (citing *Concrete Works*, 36 F.3d at 1517).

III. Analysis

The plaintiffs admit that this action is based on the same facts as the previous state action. Plaintiffs quote at length from the trial transcripts of the Chaffee County trial in their responses to the motions to dismiss and are very clear that the sole variance between the cases is that "[n]o one mentioned Plaintiffs Constitutional rights of due process had not be complied with prior to the Defendants Hughes and CDOT's taking of their property." (Pet. Rsp. Hughes at 21.) They now claim, "Their attorney failed to protect

their constitutional rights; said rights were never addressed, not to the Plaintiff/Petitioners by their attorney nor by the Court." (*Id.* at 10.) They claim the state case was different because "[t]he state case was pursued solely as as (sic) one of trespass and damages." Of course, their own Petition and the court's order contradicts this statement in that the case contained claims (and awards) for injunctive relief and for damages as a result of the same set of facts which are presented to this court. The difference between the two cases is only the newly claimed grounds for relief, violation of constitutional due process brought pursuant to Title 42, U.S.C. sec. 1983.

A. Res Judicata, Claim Preclusion and Collateral Estoppel

As noted, the plaintiffs do not assert additional facts but only additional grounds in support of their petition to this court to restore their original easement and require the Hughes defendants to tear down all improvements which now impede the use of the original easement; a use, incidentally, which would violate the permit issued by CDOT because there would be two points of access to Highway 50 rather than one. The plaintiffs state,

> [p]laintiffs are not seeking a new trial against these Defendants on these same issues do not want one and are hoping that the Court will not order one. The essential facts have already been established in the sworn testimony in the Reporters' Transcript of the District Court trial

> that has already taken place and the Plaintiffs' Trial Exhibits previously submitted.

(Pet. Rsp. Hughes, p. 22.) Plaintiffs state that they want a "ruling from this Court...which confirm Petitioners' claim that they were indeed denied their assertions that they were denied their United States and Colorado's Constitutional right of due process..." *Id.* In fact, however, the court in Chaffee County agreed that the plaintiffs rights were willfully violated by the Hughes defendants and that the plaintiffs were never consulted or provided any due process prior to Mr. Hughes' violation of the easement. ("App. A," p.3.) The plaintiffs have already received the "declaration" they so desire in this case from District Court Judge Charles M. Barton. Judge Barton said, "The court understands Ms. Marr's position. Her legal right to rely upon the express terms of the easement were willfully trampled upon by Mr. Hughes." (*Id.*, p.4.) What the plaintiffs really seek by filing this new case is a different remedy than Judge Hughes was willing to apply in the state court action.

Though sometimes used to refer to the narrower concept of claim preclusion, res judicata traditionally subsumes both claim preclusion and issue preclusion, which is sometimes called collateral estoppel. See e.g. *Carter v. City of Emporia*, 815 F.2d 617, n 2 (10th Cir. 1987). "The doctrine of res judicata, or claim preclusion, will prevent a party from relitigating a legal claim that was or could have been the subject of a previously issued final judgment." *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005)(emphasis

added). See *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Res Judicata, under Colorado state law, "bars relitigation not only of all issues actually decided, but of all issues that might have been decided." *Pomeroy v. Waitkus*, 517 P.2d 396, 399 (1974); *State Engineer v. Smith Cattle, Inc.*, 780 P.2d 546, 549 (Colo. 1989). Since the underlying case arose in the state of Colorado, Colorado law will determine the limits of res judicata. "Res judicata constitutes an absolute bar only when there is in both the prior and subsequent suits identity of subject matter, identity of the cause of action, identity of parties to the action, and identity of capacity in the persons for which or against whom the claim is made." *City of Westminster v. Church*, 445 P.2d 52, 55 (1968). Of paramount importance to this case is that in Colorado, the 'same claim or cause of action' "is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies. *State Engineer v. Smith Cattle, Inc.*, 780 P.2d 546, 549 (Colo.1989)(emphasis added); *Hildebrand v. Dart Indus., Inc.* 640 F.2d 289 (10th Cir. 1981) (action barred by res judicata where plaintiffs attempted to cure statute-of-limitations defect in fraudulent-inducement claim by adding count for fraudulent termination of distributorship agreement).*

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* Federal law has almost identical requirements concerning the application of claim preclusion in the Tenth Circuit and requires: "(1) a judgment on the merits in the earlier action; (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 (10th Cir. 1999).

The two cases before the Court are identical. The parties and subject matter are the same. The only difference in this federal action is the legal theory upon which the plaintiffs now wish to proceed. See *Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997) ("[A] cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence.") What constitutes the same transaction or series of transactions is "to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. " *Restatement (Second) of Judgments* sec. 24 (1982).

One of the main policy considerations underlying res judicata is the interest in bringing litigation to an end. *Nwosun*, 124 F.3d at 1258; *B-S Steel of Kansas, Inc. v. Texas Industries, Inc.*, 327 F. Supp. 2d 1252, 1258 (D. Kan. 2004). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). See *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375, 378 (1940); *John v. United States*, 77 Fed Cl. 788, 818 (Fed. Cl. 2007). "By preventing repetitious litigation, application of res judicata avoids unnecessary expense and vexation for parties, conserves judicial resources, and encourages reliance on judicial action." *Nwosun* at 1258.

The plaintiffs in this case are attempting to pick low-hanging fruit from the tree of jurisprudence and obtain the forbidden second bite of the apple. I therefore recommend that Plaintiffs' Petition for Redress be dismissed as barred by the principles of claim preclusion and res judicata.

Defendants also raise in their Motions to Dismiss that the Petition is likely barred by the two year statute of limitations in sec. 1983 cases and that the claims are precluded by the *Rooker-Feldman* Doctrine and by the Eleventh Amendment. Although these claims may well be meritorious, because the issue of claim preclusion is so clear, this court will not address those issues as part of its recommendation of dismissal.

B. Summary Judgment

The plaintiffs cite to the transcripts of the Chaffee County case and state that based on that evidence they should be granted summary judgment in this case. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.56. The moving parties in this matter are the plaintiffs and they have not shown they are entitled to judgment as a matter of law since their claims are barred pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

WHEREFORE, for the foregoing reasons, I respectfully

RECOMMEND that

(1) "Defendant Larry and Tommie Hughes' Motion to Dismiss" [Doc. No. 7] be GRANTED.

(2) "Defendant Colorado Department of transportation's Motion to Dismiss" [Doc. No. 8] be GRANTED.

(3) "Petitioners' Motion for Summary Judgment" [Doc. No. 17] be DENIED.

ADVISEMENT TO THE PARTIES

Within ten days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. sec. 636(b)(1); Fed. R. Civ. P. 72(b); In re *Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the District Court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the District Judge of the Magistrate Judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and

recommendations of the magistrate judge. See *Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District Court's decision to review a Magistrate Judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *One Parcel of Real Property*, 73 F.3d at 1059-60 (a party's objections to the Magistrate Judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the District Court or for appellate review); *International Surplus Lines Insurance Co. v. Wyoming Coal Refining Systems, Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the Magistrate Judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). But see, *Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

Dated this 15th day of August, 2008.

BY THE COURT:

S/Kathleen M. Tafoya
Kathleen M. Tafoya
United States Magistrate Judge

Respectfully submitted. this day 20 of October, 2009.

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Petitioner

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